

SERVICE DATE – MAY 22, 2015

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35817

JGB PROPERTIES, LLC—PETITION FOR DECLARATORY ORDER

Digest:<sup>1</sup> The Board concludes that a state court is not preempted from finding that a landowner unlawfully interfered with a permanent rail easement by removing tracks from its property.

Decided: May 21, 2015

Petitioner JGB Properties, LLC (JGB), asks the Board to declare that a lawsuit in the New York state courts, which resulted in a judgment that JGB unlawfully removed railroad tracks from its property in violation of a permanent easement for railroad track, is preempted by the Board's exclusive jurisdiction over railroad transportation under 49 U.S.C. § 10501(b). This decision denies JGB's petition for declaratory order. As discussed below, the state court proceeding does not unreasonably interfere with rail transportation and is not preempted.

BACKGROUND

This case involves properties located in the Syracuse-Woodard industrial park/commercial complex (sometimes referred to as the "Woodard Industrial District"), located adjacent to CSX Transportation Inc.'s (CSXT) St. Lawrence Subdivision<sup>2</sup> in Clay, N.Y., a suburb of Syracuse, N.Y. The Woodard Industrial District was developed in the mid-1960s when the St. Lawrence Subdivision was owned by the New York Central Railroad (NY Central).<sup>3</sup>

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

<sup>2</sup> CSXT's St. Lawrence Subdivision links the Syracuse, N.Y. area with Montreal, Que., and Oswego, N.Y.

<sup>3</sup> JGB Pet. for Declaratory Order, V.S. Betak at 2. Through a series of mergers, the St. Lawrence Subdivision became part of Consolidated Rail Corporation, Inc. (Conrail), and later CSXT.

The Easements. In two agreements reached in the mid-1960s between Woodard Industrial Corporation (Woodard), developer of the Woodard Industrial District, and D. H. Overmyer Company, Inc. (Overmyer), Woodard granted Overmyer two permanent easements for railroad rights-of-way over Woodard's property. The easements gave Overmyer's northern and southern parcels access to the St. Lawrence Subdivision. The record indicates that Overmyer laid the tracks at issue in about 1966.<sup>4</sup> There is no evidence that Overmyer conducted any rail operations in the Woodard Industrial District. It is undisputed that the only rail carriers that have served the Woodard Industrial District are NY Central and its successors.

Steelway Realty Corporation (Steelway) acquired the Overmyer northern parcel in 1978, and Ironwood, LLC (Ironwood) acquired the Overmyer southern parcel in 1996.<sup>5</sup> Both parties claim to be successors to the rail easements, which were used to move boxcars between warehouses on the parcels and the mainline. However, most of this rail traffic ceased over a decade ago.

In 2005, JGB purchased the Woodard property subject to the easements needed to reach the mainline of NY Central's successor, CSXT. At the time of JGB's purchase, two tracks, Track 232 and Track 230, branched off the mainline and crossed onto the easements over JGB's property. Beyond the JGB property, Track 232 split into branches, including one leading to Ironwood's warehouse on the southern parcel,<sup>6</sup> and Track 230 split into more branches, including one reaching Steelway on the northern parcel.<sup>7</sup> See JGB's diagram map attached as an Appendix to this decision.

State Court Proceedings. In 2009, JGB removed a section of Track 232 that crossed its property, terminating Ironwood's ability to receive CSXT rail service. Ironwood and Steelway then commenced an action in August 2009 in the Supreme Court of Onondaga County, N.Y., to protect their easements from JGB's interference.<sup>8</sup>

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<sup>4</sup> See CSXT Reply to Pet. for Declaratory Order 9; Complaint 4 attached to JGB Pet. for Declaratory Order at Counsel Ex. 3.

<sup>5</sup> See CSXT Reply to Pet. for Declaratory Order 4-5; Ironwood v. JGB Prop., N.Y. Supreme Court Index 09-5776 (Dec. 2, 2009) (2009 Decision on Motion) attached to CSXT Reply at Exhibit A.

<sup>6</sup> JGB Pet. for Declaratory Order 6. Currently, Ironwood leases this warehouse to four tenants. Ironwood and Steelway Reply to Pet. for Declaratory Order, V.S. Berry 4.

<sup>7</sup> Currently, Steelway leases these buildings to three separate businesses. See V.S. Berry 4.

<sup>8</sup> In the New York State court system, the Supreme Court is the trial court, the Supreme Court, Appellate Division is the intermediate appeals court, and the Court of Appeals is the highest court of the state.

In a “Decision on Motion” dated December 2, 2009, and the resulting Order issued on December 22, 2009, the state trial court found that Ironwood and Steelway possess permanent right-of-way easements for railroad tracks, that they have a continuing right to use and maintain the rights-of-way, and that JGB’s conduct was unlawful. See 2009 Decision on Motion; Ironwood v. JGB Prop., N.Y. Supreme Court Index 09-5776 (Dec. 22, 2009).<sup>9</sup> The trial court enjoined JGB from interfering with the use of the easement by Ironwood and Steelway, including the removal of track and supporting materials. In a subsequent hearing, the trial court determined that Ironwood was not entitled to compensatory damages because it had not shown that JGB’s actions had diminished the value of Ironwood’s property, but that Ironwood was entitled to punitive damages because JGB had acted maliciously in removing the track. See 2009 Decision on Motion at 7-8.<sup>10</sup> On appeal, the New York State Supreme Court, Appellate Division affirmed the trial court’s finding that Ironwood was entitled to punitive damages, agreeing that JGB’s actions amounted to a “wanton, willful or reckless disregard of [Ironwood]’s rights relative to the easement.” The appellate court also found that Ironwood was entitled to compensatory damages based on the cost of restoring the track, and it remanded the case back to the trial court to determine damages. See Ironwood v. JGB Prop., N.Y. Supreme Court Index No. 2009-5776 (Mar. 21 2014) (granting punitive damages and noting the prior award of compensatory damages).<sup>11</sup>

In November 2013, JGB filed a motion asking that the trial court dismiss the proceeding because the Board has exclusive jurisdiction over these matters under 49 U.S.C. § 10501(b), and the state court lawsuit therefore was preempted. The trial court denied JGB’s motion. See Ironwood v. JGB Prop. (State Preemption Order), N.Y. Supreme Court Index 09-5776 (Dec. 3, 2013).<sup>12</sup> The court stated that “[t]he theory of Plaintiffs’ case has always been for money damages relating to Defendant’s interference with the easement and the wrongful destruction of its property. The law to be applied to this case is the common law on real property and easements in New York. The very purpose of New York’s real property common law is, of course, not to manage or govern rail transportation. Furthermore, it can hardly be said that any of the laws applied in this case interfere in any way with rail transportation.” State Preemption Order 10. The New York State Supreme Court, Appellate Division recently denied JGB’s appeal of this order and the award of compensatory damages. See Ironwood v. JGB Prop., 122 A.D.3d 1306 (dismissing appeal of the State Preemption Order); Ironwood v. JGB Prop., 122 A.D.3d 1305 (Nov. 14, 2014) (dismissing appeal of decision awarding compensatory damages).

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<sup>9</sup> Ironwood and Steelway attach the December 22 Order to their May 30 reply at exhibit 1.

<sup>10</sup> The trial court found that JGB knew that Ironwood objected to removal of the track, that the first contractor JGB contacted refused to remove the track because of its doubts about JGB’s authority, and that the contractor JGB hired demanded an indemnification clause because of its doubts about JGB’s right to remove the track.

<sup>11</sup> CSXT attaches this decision to its May 30 reply at Exhibit A.

<sup>12</sup> CSXT attaches the State Preemption Order to its May 30 reply at Exhibit A.

Filings at the Board. JGB filed a petition for declaratory order with the Board on April 9, 2014.<sup>13</sup> First, JGB asks the Board to declare that the tracks on its property are common carrier railroad lines for which approval from the former Interstate Commerce Commission should have been sought under the predecessor to 49 U.S.C. § 10901 prior to construction in the mid-1960s. Second, JGB asks the Board to find that any past or present initiatives by interested parties to construct or operate the trackage, absent authorization from the Board, should be prohibited, subjected to civil penalties under 49 U.S.C. § 11901, and halted through a cease and desist order. Finally, JGB asks the Board to find that § 10501(b) preempts the state court from taking any initiatives that govern, regulate, or impose penalties or damages associated with the construction, acquisition, operation, or use of the tracks across its property.

Alternatively, JGB asks that, if the Board finds that the tracks on JGB's property are authorized under the statute, the Board treat its filing as an application for adverse abandonment (while seeking "exemption from the formal application requirements" for adverse abandonment). JGB claims that there is a lack of present or future need for rail service over the trackage extending toward Ironwood<sup>14</sup> and that it has been de facto abandoned. JGB also notes the poor condition of this trackage and that it neither qualifies as Class I track under Federal Railroad Administration standards nor is it designed for modern railroading.<sup>15</sup>

On May 30, 2014,<sup>16</sup> Ironwood and Steelway filed a joint reply in opposition to JGB's petition for declaratory order. They ask that the Board summarily deny JGB's petition on grounds that the state court proceeding involves issues of New York property law and focuses on the existence and enforceability of easements rather than on matters subject to the Board's jurisdiction. Ironwood and Steelway claim that federal preemption does not apply to the state court action. Should the Board evaluate the regulatory status of the tracks in question,<sup>17</sup> they claim that the tracks' structure, length, and possible use are far more consistent with that of private tracks (which are not within the Board's jurisdiction) or tracks excepted from Board licensing under 49 U.S.C. § 10906, than railroad lines subject to Board licensing under 49 U.S.C. § 10901. Ironwood and Steelway also oppose the request to grant an adverse abandonment of the tracks across JGB's property. In support of their filing, these parties submit the verified statement of Richard Berry, the manager for the Ironwood and Steelway properties.

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<sup>13</sup> JGB included with its petition the 2009 New York state complaint filed against JGB and the verified statement of John F. Betak, a former Assistant Vice President at Conrail.

<sup>14</sup> JGB calls this trackage the South Steelway Boulevard Line, and it is marked in red on JGB's map attached in the Appendix.

<sup>15</sup> See JGB Pet. for Declaratory Order 26-27.

<sup>16</sup> By decision served on April 28, 2014, the Board extended the deadlines for replies to May 30, 2014.

<sup>17</sup> Ironwood and Steelway assert that their characterization of the track should equally apply to additional trackage in the Woodard Industrial District, including track reaching Steelway.

Also on May 30, 2014, CSXT submitted a reply in opposition to JGB's petition for declaratory order. CSXT, the rail carrier that owns the mainline near the Woodard Industrial District, states that it has an agreement with Ironwood to provide service if the track removed by JGB is replaced. CSXT asks the Board to deny JGB's requests and determine that the Board has exclusive jurisdiction over the tracks at issue regardless of whether they are classified as railroad lines or excepted track. CSXT urges the Board to reject JGB's request that the Board find the state court proceeding preempted by § 10501(b) because the court's finding that valid easements exist does not impose permitting or preclearance requirements on a railroad and does not interfere with rail transportation.

JGB filed a reply to the replies on June 17, 2014, and asks that the Board accept it into the record. In the reply, JGB argues that the tracks across its property are not private tracks, that adverse abandonment authority is warranted here, and that it is not seeking to preempt state property law, but merely the state matters that infringe on the Board's licensing authority and jurisdiction.<sup>18</sup>

On December 9, 2014, JGB filed a supplement to its petition for declaratory order. JGB asserts that it has discovered the recent removal of a remaining portion of Track 232 on private property owned by National Grid, an electric utility company that owns 50 feet of property running adjacent to the CSXT mainline. JGB claims that this removal further calls into question the feasibility and viability of rail service on the trackage extending to Ironwood.

CSXT filed a reply on January 16, 2015, and Ironwood and Steelway also jointly replied on that date. Ironwood and Steelway explain that, after a derailment along Track 230, one of the rails was split, thereby preventing CSXT service to Rotondo Warehousing (Rotondo). CSXT and Rotondo decided to remove a small section of Track 232 to allow continued CSXT rail service for Rotondo. According to Ironwood and Steelway, repairs to Track 232 were already needed as a result of JGB's unlawful removal of the portion of track that crossed JGB's property, and therefore it was anticipated that the small piece of rail removed from that same track could be readily replaced when future repairs to Track 232 were made.

On February 5, 2015, JGB filed a response claiming, among other things, that the parties did not seek the consent of National Grid before removing the track. On February 25, 2015, CSXT moved to strike JGB's February 5 filing. Ironwood and Steelway submitted another filing on April 9, 2015, and JGB filed a response on April 13, 2015.

Federal Court Proceeding. In a further effort to void the state court judgments against it, JGB filed suit against Ironwood and Steelway in the United States District Court for the Northern District of New York in December 2014. On March 26, 2015, the federal court issued a Decision and Order denying injunctive relief and dismissing the suit on the merits. See JGB

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<sup>18</sup> CSXT filed a response on June 26, 2014, and Ironwood and Steelway filed a joint response on June 30, 2014.

Prop. v. Ironwood (March 2015 Decision), No. 5:14-CV-1542 (GTB/ATB) (N.D.N.Y. Mar. 26, 2015). Among other things, the federal court found that the exercise of jurisdiction by the state court was not preempted because Ironwood's and Steelway's claim that JGB unlawfully interfered with their easements was "not a claim regarding 'the construction, acquisition, operation, abandonment or discontinuance' of any type of 'tracks[] or facilities'" under § 10501(b)(2), and that requiring JGB to provide compensation for its unlawful removal of the track segment would not have the effect of preventing or unreasonably interfering with railroad transportation. March 2015 Decision, slip op. at 16-17.

## PRELIMINARY MATTERS

On February 25, 2015, CSXT moved to strike JGB's February 5, 2015 filing as a prohibited "reply to a reply."<sup>19</sup> We will deny CSXT's motion to strike and accept JGB's February 5, 2015 filing in the interest of a complete record. For the same reason, we will also grant the request of Ironwood and Steelway to accept their April 9, 2015 submission and accept all filings submitted by the parties to date.

## DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. § 554(e) and 49 U.S.C. § 721, the Board may issue a declaratory order to eliminate controversy or remove uncertainty. The Board has broad discretion in determining whether to issue a declaratory order. See Intercity Transp. Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984); Delegation of Auth.—Declaratory Order Proceedings, 5 I.C.C.2d 675 (1989). Here, the dispute is grounded in state property law, and JGB has not demonstrated that the New York courts have taken any action that unreasonably interferes with rail transportation. Therefore, there is no reason for the Board to intervene.

Under 49 U.S.C. § 10501(b), the jurisdiction of the Board over transportation by rail carriers and associated property and the remedies provided under 49 U.S.C. §§ 10101-11908 are exclusive and preempt the remedies provided under federal or state law. See Norfolk S. Ry.—Pet. for Declaratory Order (NSR-2010), FD 35196, slip op. 3 (STB served Mar. 1, 2010). Section 10501(b) is intended to prevent a patchwork of local regulation from unreasonably interfering with interstate commerce. See U.S. Env. Protection Agency—Pet. for Declaratory Order, FD 35803, slip op. at 7 (STB served Dec. 30, 2014). Therefore, the Board and the courts look to whether a challenged action would prevent or unduly interfere with railroad operations and interstate commerce,<sup>20</sup> and if it would, it is preempted.

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<sup>19</sup> 49 C.F.R. § 1104.13(c).

<sup>20</sup> See NSR-2010, slip op. at 3. See also Franks Inv. Co. v. Union Pac. R.R., 593 F.3d 404 (5th Cir. 2010) (en banc); Jie Ao & Xin Zhou—Pet. for Declaratory Order, FD 35539, slip op. at 1 (STB served June 6, 2012); E. Ala. Ry.—Pet. for Declaratory Order, FD 35583, slip op. at 6 (STB served Mar. 9, 2012); Mid-America Locomotive & Car Repair, Inc.—Pet. for Declaratory Order, FD 34599, slip op. at 5 (STB served June 6, 2005); Maumee & W. R.R. &

(continued . . . )

This case stems from JGB's removal of trackage leading to Ironwood over Ironwood's objection. Ironwood and Steelway sued JGB to protect their easements. At bottom, JGB's petition here is an attempt to invoke federal preemption to avoid the consequences of the state court's action.

We find that the suit brought by Ironwood and Steelway and the resulting state court orders do not unduly interfere with rail transportation. Based on its application of state property law, the court found that JGB had acted unlawfully in removing track and subsequently awarded damages for JGB's destruction of property. The court's ruling in no way interferes with the provision of rail service but helps preserve it. JGB asks us to apply § 10501(b) in such a way as to shield it from the consequences of its removal of trackage, which has prevented restoration of rail service to Ironwood. Under these circumstances, a determination that federal preemption applies to the court's decision to award damages for removal of trackage in violation of a permanent rail easement would stand the purpose of § 10501(b) on its head. JGB has failed to demonstrate that we should disturb the New York state court proceedings or preclude Ironwood and Steelway from proceeding with the relief that they seek there.

It is not necessary for the Board to determine whether these tracks are excepted tracks under § 10906, railroad lines subject to Board licensing under § 10901, or private tracks outside the Board's jurisdiction because a ruling on that issue would have no bearing on the state court's finding that Ironwood and Steelway have valid railroad easements across JGB's property. Even if we were to find that the tracks on JGB's property are unauthorized railroad lines, as JGB suggests, that would not entitle JGB to resort to self-help by removing the tracks. Nor, as discussed above, would such a finding preempt the state court's determination that valid easements exist.<sup>21</sup> If we were to find that the tracks are private, as suggested by Ironwood and Steelway, then there would be no federal jurisdiction over the tracks, but this would also have no effect on the state court's determination that valid easements exist.

Finally, a finding that the tracks are excepted tracks under § 10906, as suggested by CSXT, would make the tracks subject to the Board's jurisdiction, but would not preempt the state court's determination that valid easements exist under state law for the same reasons. Moreover, if the tracks are excepted tracks under § 10906, there would be no inconsistency with the state court's findings because, based on the information that has been presented to us, we conclude that the tracks have not been abandoned under our statute. The key consideration in

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( . . . continued)

RMW Ventures, LLC—Pet. for Declaratory Order, FD 34354, slip op. at 2 (STB served Mar. 3, 2004).

<sup>21</sup> Moreover, even if the tracks were unauthorized railroad lines, we would not, in any event, consider granting adverse abandonment authority here based on JGB's petition for declaratory order but rather would require the filing of an application for that relief.

making this determination is whether the carrier has continued to exhibit a fixed and continuing intent to hold out to provide common carrier rail service to the public. See Pinelawn Cemetery—Pet. for Declaratory Order, FD 35468, slip op. at 10 (STB served Apr. 21, 2015). Here, Ironwood has been soliciting tenants for its property, and CSXT has a written agreement with Ironwood to provide rail service should the track removed by JGB be replaced.<sup>22</sup> JGB cannot successfully claim that the tracks have been abandoned by non-use when Ironwood has been blocked from restoring and rehabilitating the tracks by JGB's actions and litigation. The record also demonstrates that there is a desire to rehabilitate the track once matters with JGB are settled.

In sum, the state court proceeding does not unreasonably interfere with rail transportation and is thus not preempted. We will therefore deny JGB's petition.

It is ordered:

1. All filings submitted by the parties to date are accepted into the record and requests for leave to submit such filings are granted.
2. JGB's petition for declaratory order is denied and this proceeding is terminated.
3. This decision is effective on its date of service.

By the Board, Acting Chairman Miller and Vice Chairman Begeman.

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<sup>22</sup> See CSXT Reply to Pet. for Declaratory Order 8. We note that, in 2009, Ironwood was in negotiations with two potential tenants interested in leasing its property and having rail service. Due in part to JGB's removal of the track and the fact that Ironwood could not guarantee when rail service would be available, the 2009 negotiations failed. See Ironwood and Steelway Reply to Pet. for Declaratory Order, V.S. Berry 7.



## APPENDIX

JGB provides this diagram at page 6 of its petition for declaratory order.

